IN THE

# Supreme Court of the United States

OCTOBER TERM, 1976.

**No. 76-57**

THE FIRST NATIONAL BANK OF CHICAGO,
*Petitioner,*

*vs.*

STEVEN GOLDMAN, etc.,
*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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Respondent, Steven Goldman, urges that the petition for a writ of certiorari be denied.

### QUESTION PRESENTED

This case involves the determination of the date of commencement of the running of the one-year period of limitations for a certain kind of transaction under the Truth in Lending Act. The question presented in this specific case is whether a suit must be filed within one year after a false disclosure in an open-end credit plan where:

A. The disclosure concerned the method of computing finance charges;

B. Finance charges were first imposed and were computed by the creditor for the first time approximately ten months following the disclosure;

C. No injury or damages occurred until finance charges were first imposed by the creditor;

D. The debtor had no right to sue until finance charges were first imposed; and

E. Neither the debtor nor any court could determine the falsity of the disclosure until the finance charges were first imposed, which was approximately ten months following the false disclosure.



## STATEMENT OF THE CASE

This case arises under the civil liability provision of the Truth In Lending Act, 15 U. S. C. § 1640(a) (1970). 15 U. S. C. § 1637(a)(3) requires that the creditor disclose the "method of determining the amount of the finance charge" at the time an open-end account is opened. Petitioner operates a credit card plan which is an open-end credit plan under 15 U. S. C. § 1637-(a). (A. 11)* In this case, Petitioner ("the bank") stated its method of computing the finance charge as follows:

> "Finance charges shall commence 25 days from billing date." (B. 2)

That disclosure was made in April 1970, just before Respondent ("plaintiff") opened the account.

The bank's credit card plan permitted its customers to avoid finance charges if the account balance was paid in full by a certain date. (B. 2) From the beginning of the account until February 1971, plaintiff paid his account in full before the deadline dates; thus, he did not incur any finance charges prior to February 1971. (B. 2) Plaintiff did not pay his February 9, 1971 billing statement prior to the deadline; his March 8, 1971 billing statement imposed a finance charge which the bank had computed "retroactively" as of the February billing date. (B. 2-3)** That was the first occasion on which the bank computed a finance charge on plaintiff's account. (A. 3-4)

Plaintiff's complaint was filed on July 8, 1971. (A. 11) After discovery and development of a full record, the limitations issue was presented on cross motions for summary judgment. The Court of Appeals rejected the bank's argument that the one-year period of limitations commenced running at the time of the dis-

* Citations are to pages of Petitioner's petition and appendices.

** The disclosure thus turned out to be false in that the bank computed finance charges commencing *on* the billing date instead of 25 days *after* ("from") the billing date.

closure. The Court of Appeals also rejected plaintiff's argument that there was a continuing violation. (A. 18) The Court of Appeals held that under the unique circumstances of this case, the period of limitations did not commence running until March 1971, when finance charges were first imposed. (A. 19, 20) The Court of Appeals' decision was grounded upon five reasons:

First, the Court distinguished between closed-end and open-end credit plans. In a closed-end plan the disclosures relate to a discrete transaction which is about to take place. A typical closed-end credit transaction takes place when a lender and borrower sit down together in a small loan office. The disclosures are put to the test in the transaction which follows; the disclosures become correct or false immediately and the correctness or falsity thereof become immediately discernible. In an open-end credit plan the disclosures relate to subsequent events and transactions. The truth or falsity of those disclosures does not become measurable until the subsequent events occur. Since the creditor has it within his power to later act consistently or inconsistently with those disclosures, the disclosure does not become false until the creditor acts in a manner inconsistent with the disclosure. In this case, since the disclosure at issue related to computation of the finance charge, it was only the imposition of that finance charge against which the accuracy of the disclosure could be measured. (A. 19)

Second, the measure of damages for civil liability is expressed in 15 U. S. C. § 1640(a) in terms of the amount of the finance charge. Thus, until a finance charge is imposed there ordinarily is no right of action. (A. 19)

Third, unless and until a finance charge is imposed, the debtor has neither suffered injury nor damage and he thus has no ripened cause of action. (A. 20)

Fourth, where the disclosure is false (as distinguished from an omitted disclosure), the debtor has no way of perceiving a violation until the imposition of the finance charge. An omission



can be detected by comparing the disclosures with the list of disclosures required by the Act. Such a comparison in this case would have indicated that all the required disclosures had been made; Goldman could not have known if any disclosure was false, and if so, which one.*

Fifth, the disclosure involved in this case was, unlike other disclosures which were required upon the opening of an account, not required to be repeated in monthly billing statements. (A. 20)

## REASONS WHY THE WRIT SHOULD NOT BE GRANTED

### 1. The Decision of the Court of Appeals Is Not in Conflict with Any Other Circuit.

Petitioner contends that the decision below is in conflict with the decisions of two other Circuit Courts of Appeal, *Wachtel* v. *West*, 476 F. 2d 1062 (6th Cir.), *cert. den.*, 414 U. S. 874 (1973), and *Stevens* v. *Rock Springs National Bank*, 497 F. 2d 307 (10th Cir. 1974). No such conflict exists.

The issue presented in *Wachtel* and *Stevens* was whether the omission of a disclosure required by the Truth In Lending Act is a continuing violation, *i.e.*, a violation which continues until the omission is corrected. Both courts held that such violations are not continuing. 476 F. 2d 1065-1066; 497 F. 2d 309-310. The Court of Appeals in this case explicitly agreed and rejected Goldman's continuing-violation arguments. (A. 18)

In *Wachtel*, the dissenting opinion posed a hypothetical case in which the undisclosed portion of a repayment schedule might "not evidence itself . . . until after the first year." 476 F. 2d 1066. The dissent proposed that the statute of limita-

* As it happened, when Goldman was billed in March 1971, he could tell only that the finance charges were too high—nine times what they should have been. Only after discovery depositions did plaintiff find out which particular disclosure had been false (whereupon plaintiff filed an amended complaint).

tions not begin to run until "plaintiffs discovered the defendants' violation." 476 F. 2d 1067. Contrary to the Petitioner's assertion that the majority in *Wachtel* "flatly reject[ed]" that proposed rule (Pet. 6), the majority neither rejected nor commented on the dissent. The majority simply held that there had been no continuing violation. Moreover, it is noteworthy that the decision *sub judice* did not adopt the rule proposed by the dissent in *Wachtel*. The Court of Appeals held that the period of limitations commenced running when it became possible for plaintiff to perceive the inaccuracy of the disclosure, rather than the date on which he actually discovered it. That holding is not in conflict with any other decision known to plaintiff or cited by Petitioner. If anything, *Wachtel* supports the decision *sub judice*, the Sixth Circuit having stated that even where a disclosure is omitted, ". . . this violation of the Act occurs, at the latest, *when the parties perform their contract*." 476 F. 2d at 1065. (emphasis added)

The decision below is not in conflict with any of the district court opinions cited by Petitioner. In *Kristiansen* v. *John Mullins & Sons, Inc.*, 59 F. R. D. 99, 106-107 (E. D. N. Y. 1973), *Munson* v. *Orrin E. Thompson Homes, Inc.*, 395 F. Supp. 152, 159 (D. Minn. 1974), and *Fenton* v. *Citizens Savings Ass'n*, 400 F. Supp. 874 (W. D. Mo. 1975), the District Courts rejected the continuing-violation theory, as did the Seventh Circuit in this case. In *Chevalier* v. *Baird Savings Ass'n*, 371 F. Supp. 1282, 1284-1285 (E. D. Pa. 1974), and *Munson*, *supra*, the District Courts rejected the arguments that the violations had been fraudulently concealed. Rejection by those Courts of fraudulent concealment as operating to toll the running of the period of limitations is not inconsistent with the decision below inasmuch as the Seventh Circuit in this case found it unnecessary to consider plaintiff's fraudulent concealment theories. (A. 19) In the decision not to certify a class in *Alpert* v. *U. S. Industries, Inc.*, 59 F. R. D. 491, 498 (C. D. Cal. 1973), and in *dicta* contained in *Sosa* v. *Fite*, 498 F. 2d 114



(5th Cir. 1974), *Adema* v. *Great Northern Development Co.*, 374 F. Supp. 318 (N. D. Ga. 1973), and *Munn* v. *American General Investment Corp.*, 364 F. Supp. 110 (S. D. Tex. 1973), the District Courts opined that the period of limitations had expired, all without comment on any of the issues or principles involved in this case.

In all ten of the foregoing decisions of the Courts of Appeal and District Courts, the cases involved closed-end credit plans, in each of which there was no element of either the delayed effect of a violation or a hiatus prior to the disclosure being rendered false for the first time.

### 2. This Case Presents a Narrow Question Which Is Too Unimportant to Justify Review by This Court.*

This case is unusual for at least three separate reasons. These factors combined to produce a unique fact situation in which almost one year elapsed between the time the disclosure was made and the cause of action accrued. If any one of the three factors were missing, the case could not have arisen.

First, the case involves an open-end credit plan. This has obvious relevance to the statute of limitations issue, particularly inasmuch as the plan involved here was one in which it was possible to avoid any finance charge by sufficiently prompt payment. As the Court of Appeals noted, under any other type of credit arrangement, the fact situation presented here is not likely to arise because a finance charge would be incurred with the first payment and the accuracy of disclosures could thus be promptly determined. (A. 15, 16) This would be true of any closed-end credit plan. It would also be true of any open-end credit plan which did not include the option to avoid finance charges by prompt payment.

* The bank's petition for rehearing was denied; no member of the Seventh Circuit Court of Appeals, including dissenting Justice Stevens, felt that the issue was important enough to warrant further review.

Second, the false disclosure was unusual in that it was not required to be repeated wtih each monthly billing statement. (A. 20) 15 U. S. C. § 1637(a) sets forth those disclosures which must be made before opening an account under an open-end credit plan. 15 U. S. C. § 1637(b) requires most of those items to be repeated with each monthly billing statement, but the disclosure involved here was not one which must be repeated.* Thus, even under open-end credit plans, the fact situation presented here would normally be impossible, because the complaint could be based on the repetition of the false disclosure in the periodic billing statement. (A. 20)

But the most important factor making this case unusual is that the violation alleged is not the omission of a required disclosure but the making of a false disclosure. (A. 12, 18) The Court of Appeals said explicitly that this was "more significant" than the open-end/closed-end distinction. (A. 18) The fact that the disclosure was false is determinative of the limitations issue because the cause of action is incomplete until the bank takes some action inconsistent with the disclosure.

Plaintiff is not aware of any other case which presents the combination of these three factors which were essential to this case. Petitioner has not cited any such case. As has been noted herein, the cases cited by Petitioner decided quite different issues. It seems unlikely that many cases like this one will arise in the future. If this prediction turns out to be wrong, then additional opportunities will be presented for this Court to review the narrow question presented.

Petitioner also contends that Congress' failure to amend the statute, in light of *Wachtel* and *Stevens*, has dispositive significance, an argument which is completely dependent on Petitioner's incorrect assertion that the decision below is inconsistent with those cases. Because no such inconsistency has arisen, it is irrelevant that Congress has not amended the Act to sanction the continuing-violation theory.

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* Compare 15 U. S. C. § 1637(a)(3) with 15 U. S. C. § 1637(b).



**3. The Court of Appeals Properly Applied Well Established Statute of Limitations and Ripeness Doctrines to This Case.**

The bank argues that the decision below upsets the Act's scheme of civil remedies. But the limitations provision is no more a designed counterbalance under this statute than it is under any other. In holding that the one-year period did not commence running until plaintiff suffered injury and damage, the Court of Appeals applied statute of limitations principles which have long been settled under decisions of this Court.

Statutes of limitation do not begin to run until plaintiff's "right has accrued in a shape to be effectually enforced." *Borer* v. *Chapman*, 119 U. S. 587, 602 (1887). More recently, this Court held:

> "It would require language so clear as to leave room for no other reasonable construction in order to induce the belief that Congress intended a statute of limitations to begin to run before the right barred by it has accrued.
>
> * * * * *
>
> "We are of the opinion that Congress did not intend the limitations of section 610 to run . . . until the . . . right 'has accrued in a shape to be effectually enforced.'" *United States* v. *Wurts*, 303 U. S. 414, 418 (1938).

Similar considerations controlled in *Woods* v. *Stone*, 333 U. S. 472 (1948), and *Rosenman* v. *United States*, 323 U. S. 658 (1945). In *Woods* this Court stated:

> "It would be unusual, to say the least, if a statutory scheme were to be construed to include a period during which an action could not be commenced as a part of the time within which it would become barred." 333 U. S. at 477.

The decision of the Court of Appeals was a straightforward application of this rule to the facts of this case.

The bank's disclosure stated that it computed finance charges commencing on the 25th day after the billing date. In March 1971, the bank computed plaintiff's finance charge commencing

on the billing date. Since that was the first occasion when plaintiff was subjected to any finance charge, that was the first occasion when plaintiff was injured and, accordingly, that was the first time when plaintiff had a ripened right of action.* Prior to March 1971, plaintiff could not have sued even if in some way plaintiff had known of the falsity of the bank's disclosure.

As the Court of Appeals stated:

> "The imposition of a finance charge under an open end credit plan in which an inaccurate disclosure has been made *is a necessary condition of the assessment of liability since it is this charge against which the accuracy of the disclosure must be measured.*" (A. 19) (emphasis added.)

A contrary decision would result in a drastic expansion of present doctrines concerning ripeness and the requirement of an actual case or controversy as preconditions for litigation. Until a finance charge was imposed on plaintiff, there was no yardstick by which to measure the falsity of the disclosure, no injury to plaintiff and no way of determining the amount of damages.

The ripeness doctrine is of constitutional origin. This Court has frequently repeated that there is no constitutional case or controversy when the issue presented depends on hypothetical or contingent future events. See *Regional Rail Reorganization Act Cases,* 419 U. S. 102, 146 (1974) (the court will not make "rulings upon 'hypothetical situations that may or may not' " arise); *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974) (there is no case or controversy where the injury is " 'conjectural' or 'hypothetical' "); *Communist Party of the United States* v. *Subversive Activities Control Board,* 367 U. S. 1, 77 (1961) (the court will not rule on "future and hypothetical controversies"); *International Longshoremen's and Warehousemen's Union, Local 37* v. *Boyd,* 347 U. S. 222, 223-224 (1954)

* It was only a happenstance that plaintiff's first finance charge occurred within one year after the disclosure. It could have occurred more than one year after the disclosure, in which event Petitioner's argument would mean that plaintiff's right of action expired before he had an effective opportunity to sue.



("hypothetical situations that may or may not" arise present no case or controversy); *United Public Workers of America (C. I. O.)* v. *Mitchell,* 330 U. S. 75, 89-90 (1947) (a "hypothetical threat is not enough" to create a case or controversy); *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1945) (the court will not "decide abstract, hypothetical or contingent questions"). In some of the cases just cited, the Court sought in part to avoid deciding constitutional issues but "the principle is not different where statutory issues are raised." *O'Shea* v. *Littleton,* 414 U. S. 488, 494 (1974); see also *Alabama State Federation of Labor* v. *McAdory,* 325 U. S. 450, 461 (1945).

Since no cause of action had accrued when the disclosure was made, or even when the plaintiff first used his credit card, the Court of Appeals correctly concluded that the statute of limitations could not run from either of those dates. The Court of Appeals properly held that the limitations period began on the date on which plaintiff was first billed for a finance charge. This date was significant for several reasons.

First, the imposition of a finance charge was clearly contemplated as the normal event which would give rise to a suit under the Act. (A. 19) Second, the finance charge is the measure of recovery; before a finance charge was imposed, there was no way to quantify a judgment. Third, on these facts, imposition of a finance charge was an essential prerequisite to plaintiff's discovery of the violation. (A. 15) Fourth, on these facts, imposition of a finance charge was an essential prerequisite to a determination of liability; the Court could not determine whether the disclosure was true or false until the bank had had an opportunity to act either consistently or inconsistently with the disclosure. (A. 19) Fifth, on these facts, imposition of a finance charge inconsistent with the disclosure was the first event which gave rise to a case or controversy.

The language of the Act's provision for civil remedy confirms this logic. 15 U. S. C. § 1640(a)(2)(A) provides for damages of "twice the amount of any finance charge in con-

nection with the transaction . . .," thus clearly establishing Congress' intention that the imposition of finance charges is ordinarily both the triggering event for liability and the benchmark for measuring any recovery.* *Mourning* v. *Family Publications Service, Inc.*, 411 U. S. 356 (1973), is not *contra.* In *Mourning* there was a real finance charge but it was concealed.

For all of these reasons, imposition of a finance charge was an appropriate trigger for the running of the statute of limitations in this case.

The decision below is fully consistent with the policy of statutes of limitation. That policy is to prevent plaintiffs from resting on their rights and allowing their claims to become stale, not arbitrarily to bar claims without there ever being a reasonable chance to assert them. The policy of *Borer* v. *Chapman*, 119 U. S. 587, 602 (1887), and *United States* v. *Wurts*, 303 U. S. 414, 418 (1938), must be read into every federal statute of limitations; Congress could not have intended that a right be barred before it has accrued. Moreover, the policy of the statute controls over its literal wording. *Minnesota Mining & Mfg. Co.* v. *New Jersey Wood Finishing Co.*, 381 U. S. 311, 321 (1965).

Acceptance of Petitioner's view of this case would require a holding that plaintiff had a right to sue prior to the imposition of a finance charge, prior to his first use of the credit card and prior even to the opening of the account. In addition to drastically expanding long-standing doctrines of ripeness, such a holding would invite suits seeking recovery for allegedly false disclosures which have not yet (and may never) injure the suing party. In addition, suits would proliferate on the basis of debtors—or potential customers—surmising or speculating that a disclosure *might* later turn out to be false. That species of speculative, *in futuro* claim of harm has never been fancied as a fit subject for judicial determination. Cf. *Toilet Goods Ass'n, Inc.* v. *Gardner*, 387 U. S. 158, 163 (1967).

* In the case of class actions, Section 1640(a)(2)(B) does not repeat the "finance charge" language, but finance charges remain as having the same obvious Congressionally intended significance.



Of perhaps even greater significance, a decision which would expand the definition of a case or controversy would have profound effects in all areas of federal law, the *stare decisis* effect of which would inevitably lead to an increase in the number of speculative lawsuits.

## CONCLUSION

The decision below was rendered on the unique factual situation of this case, on the basis of long standing principles of ripeness and the requirement of an actual case or controversy in accord with applicable decisions of this Court. The Court of Appeals created no conflict with other circuits. The general statute of limitation principles applied by the Court of Appeals are not disputed, and the accuracy of the Court of Appeals' application of those principles to the unique facts of this case is not an important question of federal law which should be reviewed by this Court. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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